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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 821

BADGER-METER MANUFACTURING COMPANY,

Petitioner;

v.

JAMES B. BRENNAN, in his capacity as United States Attorney for the Eastern District of Wisconsin; and EMIL J. NELSON, in his capacity as District Director of Internal Revenue,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jesse Climenko, attorney for the petitioner Company, prays on its behalf that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit dismissing the Company's appeal from a judgment of the District Court for the Eastern District of Wisconsin. An Appendix is separately presented.

OPINIONS BELOW

Neither opinion is reported. The district court's opinion is Appendix B.[1] The opinion of the court of appeals is Appendix E.

The Company's entire case on this petition is based on questions of law, and the facts found by the district court are accepted.[2]

JURISDICTION

The judgment of the court of appeals was dated and entered on November 29, 1962.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1); the third, fourth and fifth clauses of Rule 19(1)(b) of this Court; and because there exists in this case what we believe to be a special and important reason for review on writ of certiorari.

That reason rests upon the interpretation apparently given to *DiBella v. United States*, 369 U.S. 121, by the court of appeals. That interpretation applies to all citizens of at least the Seventh Circuit (as well as the Company) against whom no criminal case ever existed, and against

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[1] The Company's action was consolidated for trial and in the opinion with a separate motion to suppress made by Berner, a Company officer.

[2] The property whose return is sought is referred to herein as Company property. The district court's consolidated opinion stated that "The title as between the two petitioners [the Company and Berner] to the ledgers which, we assume, are the prime evidentiary matter sought to be suppressed, need not and cannot on the record before us be determined." (App. B, p. 21; R. 78, 79). As to the "cannot", the court obviously overlooked Berner's formal agreement that "For the purposes of the hearing and decision on this pre-indictment motion to suppress, the Court may assume that all of the records in question were corporate records." (App. C, p. 22; R. 88).

whom all future prosecutions are time-barred.* It denies to such citizens all right to have reviewed on the merits a trial court's conclusion that a search and seizure of their property by Internal Revenue Agents was lawful, and the court's refusal to order their seized property returned to them. A decision that such a seizure was unlawful, and the consequent return to a citizen of his seized property, are both of major importance to his ability to defend against the assessment of, or to recover, actual penalties founded on the fruits of the unlawful search and seizure by federal officers.

THE QUESTIONS PRESENTED FOR REVIEW

Introduction To The Circumstances Of The Case

The following circumstances apply to all the questions presented. No criminal case ever existed against petitioner, and all future prosecutions relating to any tax year in question were barred by the statute of limitations. The petitioner's requests for relief were grounded upon alleged unlawful searches for and seizures of its property by Internal Revenue Agents. The parties agreed prior to trial that if petitioner were successful they would attempt to stipulate as to the items of property to be returned.

The Questions For Review

(1) A petition to the district court requested both the return and the suppression of property. The request for

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*"Criminal case" is used in this petition in all senses encompassed by *DiBella v. United States*, 369 U.S. 121, 131; *Grant v. United States*, 369 U.S. 401 (reported below: 291 F. 2d 227); *Murphy v. United States*, 369 U.S. 402 (reported below: 290 F. 2d 573); and *Greene v. United States*, 369 U.S. 403 (reported below: 296 F. 2d 841).

suppression served no actual need or purpose. It was included because of the misrepresentation of Revenue Agents that a criminal income tax investigation was directed at the petitioner, rather than at another person, who actually was its sole target. The district court denied both requests in an order for dismissal which directed that a "final judgment" be entered in the above-entitled "[civil] action". The form of the order was approved by the respondents' attorney prior to its entry. The question thus presented is: In what past, present or future criminal case against the petitioner was the judgment a mere interlocutory non-appealable order, as the court of appeals held on respondents' motion to dismiss?

(2) The court of appeals, in dismissing petitioner's appeal, summarily denied the return of petitioner's property without considering whether petitioner might be entitled to that relief, even though not entitled to suppression. The question thus presented is: When the court of appeals departed from the rule that if a party has proved himself entitled to any relief his action will not be dismissed because he has erred as to legal theory and is not entitled to all of the relief he requested in his pleadings, did the court of appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

(3) Did the court of appeals, in holding the judgment of the district court to be interlocutory and not appealable, decide that question in a way in conflict with the essentially practical tests adopted in applicable decisions of this Court for identifying those judgments which are, and those which are not, to be considered "final"?

(4) May not the errors of the court of appeals referred to in Questions (1), (2) and (3) have been, and

may not similar errors by other courts be, induced by a too-literal interpretation of the following sentence, and particularly the word "solely", appearing at pages 131 and 132 of 369 U.S., in the *DiBella* opinion:

> "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.";

and, therefore, ought not this Court clarify such sentence so as (a) to preclude the incongruities implicit in Question (1); (b) to reconcile the *DiBella* opinion with the rule referred to in Question (2); and (c) to effectuate the *DiBella* opinion's pragmatic approach to the question of finality?

(5) The decision in *DiBella* settled a question of law which for many years had received conflicting and confused treatment by the federal courts. The petitioner's action was filed in June, 1959, almost three years before the *DiBella* decision. A decision in petitioner's action prior to *DiBella*, even if the action had been a motion for suppression under Rule 41(e) of the Federal Rules of Criminal Procedure, and even if there had been a criminal case in being against the movant, would have been appealable in, among others, the circuit in which the motion was filed, because the motion preceded any indictment of the movant. The question thus presented is: Whether this Court, in the exercise of its sound judicial discretion and its power of supervision, ought not to afford the prejudiced petitioner its one and only opportunity to have reviewed on the merits the denial of its request for the return of its property, by vacating the judgment of the court of appeals and remanding the case for review on the merits?

THE STATUTES AND RULES INVOLVED

The statutes are 28 U.S.C. §1254(1) and §1291.[4]

The provisions of the Federal Rules of Civil Procedure are Rule 1, second sentence; Rule 8(a), second sentence; Rule 8(f); and Rule 54(c), second sentence.

The above statutes and provisions of the Rules are set forth in Appendix F.

STATEMENT OF THE CASE ON THIS PETITION

In June, 1959, the Company petitioned the district court for two principal kinds of relief, i.e., the return of its property, and its suppression in any criminal proceeding against the Company, its officers or employees. (App. A, pp. 1-4; R. 3-5, 15).

The jurisdiction of the court was invoked under 28 U.S.C. §1346(a)(2). The grounds for jurisdiction were that property of the Company had been searched for and seized from it by Revenue Agents in violation of the Company's rights to due process under U.S. Const., Fourth Amendment, Clause 1; in violation of its rights to due process and fair play under §§10 and 2(a) and (f) of The Administrative Procedure Act, Act of June 11, 1946, C. 324; 60 Stat. 237; (Public Law 404), as amended; in violation of its rights to administrative due process under certain internal regulations of the Revenue Service (Pet. Exs. 15, R. 418; 17, R. 420; 18, R. 421; and 20, R. 423, all offered and received without objection at R. 327); and because the persons in possession of the

[4] References to the United States Code are to the 1958 edition, as amended to the close of the 1st session, 87th Congress, on January 9, 1962.

property were officers of the court. The factual background for these grounds of relief is summarized in Appendix G, which is entitled "Statement Of The Case Which Will Be Reviewed If The Judgment Of The Court Of Appeals Is Vacated".

The Agents misrepresented to the Company that a criminal tax investigation was directed against the Company. (App. B, pp. 8, 10, 11, 18, 19; R. 67, 69, 70, 76, 77). The fact that its sole target was Berner, a Company officer, was concealed, and not revealed until the court examined the informer's affidavit during the trial. (See Appendix and Record references following the next preceding sentence; and App. B, p. 8, n. 1; R. 68).

The district court found that there had never been any criminal case against the Company, that none was in being, and that all future prosecutions for the tax years involved were time-barred. (App. B, pp. 8, 10, 11, 13, 18, 19; R. 67, 69, 70, 72, 76, 77).

In September, 1962, the district court, after written approval of the form of the order for judgment by the attorney for the respondents, ordered that a "final judgment" be entered in petitioner's "Civil Action No. 59-C-119", denying all "the relief requested in the above-entitled action by the Petitioner" and that "this action be dismissed." (App. D, pp. 24, 25; R. 80, 81).

The Company appealed from the opinion and decision, the order for judgment, and the judgment of the court. (R. 83). The respondents moved to docket and dismiss the appeal, on the ground that the judgment was interlocutory and not appealable, under *DiBella v. United States*, 369 U.S. 121. (R. .....). The court of appeals so held. (App. E, p. 26; R. .....).

This petition is for a writ of certiorari to review that holding.

REASONS FOR GRANTING THE WRIT

The district court's decision is open to question on at least three conclusions of law, to which we have pointed in App. G, pp. 30-32. They have received differing treatment in the several circuits, and have not been settled, to our knowledge, by this Court. Nevertheless, the court of appeals peremptorily refused to review the district court's decision. (App. E, p. 26; R. .....).

Failing review on certiorari, the appellate court's refusal will establish throughout the Seventh Circuit, at least, a rule to the effect that a technical, legal error (in this case, the inclusion in a petition of a request for suppression induced by the misrepresentations of federal officers as to the target of a criminal investigation), which was not an error when made (and if it ever was an error, only became one in retrospect three years later, upon issuance of the opinion in *DiBella v. United States*, 369 U.S. 121), is sufficient ground to foreclose any review of a district court's decision on the merits.

Such a rule will be unfortunate in any type of case, much less in a case, such as this one, where the issues approach or attain constitutional dimensions. Its result will be that citizens of the Seventh Circuit, against whom no criminal case ever existed or will exist, will be deprived, on the most hair-splitting of technicalities, of any possible review of the merits of district court decisions which are of major importance to their ability to defend against the assessment of, or to recover, actual penalties founded on the fruits of unlawful searches and seizures effected by federal officers. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509, 510; *Lipke v. Lederer*, 259 U.S. 557, 562; *Tovar v. Jarecki*, 173 F. 2d 449 (7 Cir. 1949); and, c.f., *Enochs v. Williams Packing Co.*,

No. 493, October, 1961, Term; decided May 28, 1962 (30 U.S. Law Week 4400, 4402; 370 U.S. 1, 6 [Prelim. Print]); and *United States v. Sanchez*, 340 U.S. 42, 45.

We submit that the error inherent in the peremptory denial of review is rendered self-evident by the incongruity of any answer to Question (1) presented above, other than the answer "None".

The rule stated in Question (2) above is set forth in 6 Moore, *Federal Practice* (2d ed. 1953) para. 54.62, at page 1208, and the numerous authorities are collected in notes 8 and 9 on that page. And see, e.g., *Conley v. Gibson*, 355 U.S. 41, 48; *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200; and Federal Rules of Civil Procedure, 1, second sentence; 8(a), second sentence; 8(f); and 54 (c), second sentence.

In answer to Question (3) above, it is clear that the holding of the court of appeals was in direct conflict with the essentially practical tests developed by this Court for identifying those judgments which are, and those which are not, to be considered "final". *Brown Shoe Co. v. United States*, No. 4, October, 1961, Term; decided June 25, 1962 (30 U.S. Law Week 4561, 4564, 4565; 370 U.S. 294, 306, 309 [Prelim. Print]); and the cases there cited. Those tests were satisfied in this petitioner's case. No possibility existed of repetitive consideration of petitioner's action for return of its property in any criminal case against petitioner. Hence, the propriety of the district court's denial of such return was ripe for review in the appellate court. However, such review has been foreclosed to petitioner forever, absent review on writ of certiorari.

Question (4) above may, and we suspect does, reveal the source of the errors of the court of appeals referred

to in connection with Questions (1), (2) and (3). The court stated it based its dismissal of petitioner's appeal on the "doctrine and principles" of *DiBella v. United States*, 369 U.S. 121. (App. E, p. 26; R. .....). The brevity of the court's order sheds no light on the aspect of the doctrine and principles which the court believed applicable. Certainly, no criminal case ever existed against this petitioner. Nothing we have discovered in the opinion or rationale of *DiBella* made the judgment of the district court in petitioner's action anything less than the final, appealable judgment in a civil action which the district court intended it to be, and which the respondents agreed that it was at the time the judgment was ordered entered. (App. D, pp. 24, 25; R. 80, 81).

Therefore, we suspect and suggest that the word "solely" in the following sentence, again quoted from pages 131 and 132 of 369 U.S., in the *DiBella* opinion, may have persuaded the court of appeals that the peremptory dismissal was required:

> "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent."

Distinguishing between words, and the doctrine and principles of the *DiBella* opinion, we are impelled to present Question (4) above for this Court's consideration. We suggest that the word "solely" in the sentence quoted above, without further explanation, actually and directly conflicts with, and is and will prove to be an obstruction to, the application of the pragmatic tests of finality of judgments with which the doctrine and principles of *DiBella*, in every other respect, are entirely consistent.

In respect of the circumstances set forth in connection with Question (5), the appealability in the Seventh Cir-

cuit prior to *DiBella* of the denial of this petitioner's mistaken and unnecessary pre-indictment request for suppression was established by the following decisions of the court of appeals for that circuit, i.e., *Veeder v. United States*, 252 Fed. 414 (1918), certiorari denied, 246 U.S. 675; and (by implication) *Socony Mobil Oil Co. v. United States*, 275 F. 2d 227 (1960). This Court heretofore has exercised its sound judicial discretion, when the Court suddenly has changed or settled a rule of law, to take the action which an affirmative answer to Question (5) would require. *Reconstruction Finance Corp. v. Prudence Group*, 311 U.S. 579, 582, 583; *Rorick v. Board of Comm'rs of Everglades Drainage Dist.*, 307 U.S. 208, 213.

CONCLUSION

This petitioner requests, for the reasons set forth above, that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted, and that thereupon the judgment of said court be vacated and the case referred to herein be remanded to said court for review on the merits; or, in lieu of such remand and review, that this Court grant to petitioner such other and further relief as to this Court, in the exercise of its supervisory powers and discretion, may appear just, equitable and advisable.

Respectfully submitted,

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